SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1040

WHITE MOTOR CORPORATION and WHITE FARM EQUIPMENT COMPANY, *Petitioners,*

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), and its LOCAL UNIONS NOS. 932, 1147, 107 AND 337, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

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BRIEF IN OPPOSITION FOR RESPONDENTS

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local Unions Nos. 932, 1147, 107 and 337 respectfully pray that the Court *deny* the Petition for Writ of Certiorari.

QUESTION PRESENTED

Did the Court of Appeals err in enforcing the arbitrator's award in *White Motor Corp. & UAW*, 61 Lab. Arb. 320 (Seitz, 1973)?[1]

COUNTERSTATEMENT OF THE CASE

In 1950 the Company and the Union entered into a pension program covering the Company's employees, both union represented and unrepresented. The program was set out in two documents: an unsigned plan setting forth the details of the program and a short Company-Union agreement in which the Company undertook *inter alia* to maintain the plan. The plan document contained a provision giving the Company the unilateral right to terminate the plan at any time, but the agreement contained a waiver of that right as to union represented employees. (A. 3).

These arrangements continued through four successive extensions of the pension program until 1968, when the program was set forth in one document rather than two. The single document was incorporated in the parties' three year collective bargaining agreement by an express provision in the latter. While the provision on unilateral termination was present in the 1968 document, the provision waiving it as to union represented employees was not. Neither change had been discussed by the parties in their bargaining nor is there any other explanation for them. The 1971 extension was the same as the 1968 in these regards. (A 3-6).

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[1] The full arbitration decision and award are reprinted in the Addendum, *infra*. The Appendix to White's Petition will be cited "A 3."

Midway through the term of the 1971 collective bargaining agreement, the Company unilaterally terminated the pension program. The Union protested and, when the Company refused to arbitrate the matter, sued successfully to compel arbitration. (A 2). The arbitrator ruled that while the unilateral termination provision allowed the Company to terminate the program at any time as to the unrepresented employees, it could *not* do so as to the union represented, for whom the program had the same term as the three year collective bargaining agreement of which it was a part (A 6-7).

When the Company refused to comply with this part of the award, the Union sued successfully for enforcement. The Company appealed to the Eighth Circuit, which affirmed.[2]

The Court of Appeals, noting ambiguities in the documents as to the term of the pension program, approved the arbitrator's use of contract history to resolve them.[3] It ruled: "Our review of the record satisfies us that the arbitrator arrived at a decision drawn from the contract documents and from the history of the agreements leading up to the 1971 Collec-

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[2] UAW v. White Motor Corp., 505 F.2d 1193 (8th Cir. 1974). (A 1-13).

[3] As to the term of the pension program for union represented employees, the Court of Appeals found the documents ambiguous in two respects. (1) While the language incorporating the pension program into the collective bargaining agreement referred to an attached "Pension Agreement and Plan," the document attached was entitled a pension plan. There was no reference to a pension agreement, but it had always been in that document that the waiver was set out. (2) While the pension document contained no termination date, the collective bargaining agreement did, and the latter expressly incorporated the former. (A 10-12).

tive Bargaining Agreement. We conclude, contrary to the Company's contentions, that the arbitrator did not exceed his arbitral authority and that his award is valid since it 'draws its essence from the collective bargaining agreement.' *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)."

ARGUMENT

The grounds upon which the Company seeks review of the Eighth Circuit's decision are that it conflicts with four decisions from other circuits and with this Court's decision in *Enterprise*. But there plainly is no conflict, for the decision here is in perfect tune with *Enterprise*.

In *Torrington Co.* v. *Metal Products Workers*, 362 F. 2d 677 (2d Cir. 1966), after the company discontinued a long-standing, unwritten practice of a paid holiday on election day, the union attempted to reinstate the benefit during the next negotiations but failed. The arbitrator's reinstatement of the benefit was denied enforcement because, as the Second Circuit later said,[4] "[I]n *Torrington* the arbitrator relied not at all on the specific language of the collective bargaining agreement." Here, as the Court of Appeals noted, the arbitrator relied on specific language in the parties' documents, interpreting it in the light of its history.

In *UAW Local 342* v. *TRW, Inc.*, 402 F. 2d 727, 729 (6th Cir. 1968), *cert. den.* 395 U.S. 910 (1969), the arbitrator did not base his decision on the language of the contract, as here, but, as the Sixth Circuit put it, on "his own motion of 'fundamental fairness.'"

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[4] Humble Oil & Refining Co. v. IBT Local 866, 447 F.2d 229, 233 (2d Cir. 1971).

In *Textile Workers Union* v. *American Thread Co.*, 291 F. 2d 894, 900 (4th Cir. 1961), the arbitrator, after finding that the company did not violate the contract in disciplining the employee, ruled that the *measure* of discipline it imposed—discharge—was violative. Referring to the latter ruling, the Fourth Circuit held: "[I]t is that question [measure of discipline] which we hold to be beyond the terms of the submission and the contract provision for arbitration." In the instant case the Company has never contended that the arbitrator lacked authority to decide the issue he decided. (In resisting the earlier suit to compel arbitration the Company took that position, but it took no appeal from the district court's order compelling arbitration and it has not raised the issue in this case.)

H. K. Porter Co. v. *United Saw, File and Steel Product Workers,* 333 F. 2d 596, 600-602 (3d Cir. 1964), actually supports the decision here since it approved of an arbitrator's reliance on history and practice in interpreting language which was on its face unambiguous. It disapproved of his interpreting such language only where there was no history or practice to support an interpretation.

Finally, the Company contends that the decision here is in harmony with *Enterprise* only if the Court of Appeals was right in finding the parties' documents ambiguous, and the Court of Appeals was wrong. But in determining whether a conflict exists this Court looks to what the court below held, not to what the petitioner contends it should have held. In any event, the Company's assertion that arbitrators' use of contract history is narrowly limited to instances of facial ambiguity conflicts violently with *Enterprise's* basic thrust.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Petition should be *denied.*

Respectfully submitted,

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March 21, 1975

ADDENDUM

ADDENDUM

61 Lab. Arb. 320

Decision of Arbitrator

In re WHITE MOTOR CORPORATION, and its subsidiary, WHITE FARM EQUIPMENT COMPANY and UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL NOS. 932, 1147, 107 and 337, August 30, 1973

Arbitrator: Peter Seitz

* * * * * * * * * *

Appearances: For the company—Frank C. Heath (Jones, Day, Cockley and Reavis), attorney; Curtis L. Roy (Dorsey, Marquart, Wendhorst, West and Halladay), attorney. For the union—John A. Fillion, Attorney.

TERMINATION OF PLAN

SEITZ, Arbitrator:—In this case, the Union challenges the right of the Company to have terminated a pension plan with respect to bargaining unit employees and asserts that, in violation of such plan, benefits have been wrongfully reduced. It requests an award declaring that the Plan could not have been terminated by the Company until May 1, 1974 when current bargaining agreements expire and, as further relief, that benefits be paid in accordance with its position in the case and that retirees be made whole.

The Company claims that it possessed the power and right to have terminated the Plan when it did, on June 30, 1972; and it also claims that benefits have been paid in accordance with the Plan and the agreements that have been negotiated.

The facts in the case are extensive and complicated. They were ably set forth at great length in a pre-hearing stipulation of the parties which was supplemented by a considerable amount of witness testimony and voluminous exhibits. Any effort at the threshold of this Opinion to set forth a

comprehensive statement of facts (most of which are not in dispute) would greatly delay the issuance of the decision and be of doubtful utility to the parties. Accordingly, the facts basic to an understanding of the issues and the arguments made thereon, will be mentioned in connection with those arguments, but as briefly and as broadly as possible.

A. The Right of the Company to Terminate the Pension Plan

On May 1, 1971 the parties entered into renegotiated collective bargaining agreements terminating May 1, 1974. Incorporated into such collective agreements, as a part thereof, was an Exhibit C constituting a pension plan for normal and early retirement including supplemental allowances for early retirees. The Company by separate letter dated March 3, 1972 made certain guarantees in respect to the payment of pensions in the event of termination of the Plan.

Insofar as the purposes of this discussion are concerned, the provisions of the 1971 collective agreement and Pension Plan were identical with those negotiated in 1968. Article X of the Plan (headed "Certain Rights of the Company,") in Section 10.02 provided:

> "The Company shall have the sole right at anytime to terminate the entire Plan"

and in the event of termination it provided for an order of priorities in payments out of the Fund. Similarly, Section 10.01 gave the Company

> "the sole right from time to time to amend the Plan in such manner as it shall determine * * *"

and Section 10.03 gave the Company

> "the sole right to terminate the Plan at any time as to any one or more pension units * * *."

After notifying the Union in January, 1972 that business conditions required it to shut down its Minneapolis and

Hopkins plants, and, in March, 1972, that it was going to terminate the Pension Plan, the Company, relying on the right to terminate the Plan provided for in Article X of the Plan, notified the Union that the Plan was terminated as of June 30, 1972.

The Union took the position then and at the hearings that the Company was not empowered to terminate the Plan as to employees in the bargaining units until the end of the term of the collective bargaining agreement: May 1, 1974.

The Union's position is based upon the "agreement history" of the parties and predecessor parties. There is no reliance, as is frequently the case, upon the oral representations or promises of the bargainers at the negotiations table. Support, rather, is claimed in the provisions of previous collective agreements, pension agreements and pension plans; also, in a certain H—letter which will be referred to below.

The Company has vigorously objected to all of this documentary material. It was provisionally accepted by the writer for the record with decision reserved. Before discussing the material it would be best to deal with the Company's objection to the evidence.

Of course, competent parties, dealing at arm's length in a bargaining relationship, are to be held to the provisions in the written instruments they solemnly signed. Of course, what is set forth, unambiguously and unequivocally in written contracts is, normally, the best objective evidence of the duties and rights which they apportioned among each other and to which they should be considered bound. Of course, normally, and in the absence of unusual and compelling circumstances, it is improper for a decision-maker (judge or arbitrator) to go outside the unambiguous expressions of the signatories to determine what it was the parties had agreed. In several decades of full-time, labor-management dispute arbitration, the writer, on many scores of occasions has found it necessary to state, in opinions, that, when competent parties, bargaining at arm's length, reduce their

undertakings to a writing which they proceed to ratify and sign, they will be held to what they expressed in that writing. Any other rule of general application would wreak chaos in contract law and make a shambles of the employer-union relationship.

Nevertheless, putting aside the considerations, on the basis of which an equitable reformation of an instrument might be appropriate, notwithstanding the weight of and the universal recognition accorded to the general rule referred to above, there are situations when it is appropriate to look above and beyond the unambiguous language of the written document in a search for the core of the bargain that the parties struck. Thus, for example, when a contract is silent on a subject-matter (or even if it speaks), a full generation of labor-management dispute arbitrators has given recognition to the role played by "practice," custom or usage to identify the reciprocal rights and duties of the parties. This approach, I believe, is based upon the theory (not always articulated) that the true quarry and objective of the decision-maker is to determine what the facts show, objectively, as to the real intentions of the parties and how they interpreted their mutual goals. What they wrote, in the absence of other compelling facts, certainly, is powerful *evidence* of their bargain (and, normally what they wrote, is conclusive as to its elements and ingredients); but the written document is no more than evidence of the underlying real or core substance of their agreement. Decision-makers will be influenced by the manner in which the parties, themselves, in the course of administering their "contract" read it and applied it. Accordingly, a series of grievance settlements overtime (for example) consistently contradictory to the words in the contract could be regarded as evidence of how the parties, jointly, had determined to interpret and apply their written document. Such circumstances, conceivably, would show that the parties, mutually, had agreed to regard the written terms as a "dead letter," in whole or in part, as applied to particular facts. In such circumstances the so-called parole evidence rule would be

ignored or, alternatively, the situation would be regarded as one of the numerous exceptions to the rule. Similarly, conduct over time showing a mutual acceptance of a particular way of doing things on which the contract is silent, if sufficiently persuasive and compelling, could prove a practice, custom, or usage which is as binding upon the parties as the printed word. In such a circumstance the "practice" has the same effect as the written provisions in a "contract"; the only difference being that it is proved by behavior rather than by the printed word in a signed instrument. The general rule described above is also subject to another exception. However unambiguous and clear the written terms may appear to be, the rights and duties of the parties will be fixed by court or arbitration decisions which interpret and apply them. This is not to say that in a subsequent case the prior decision cannot be questioned and that it is an unassailable precedent; but that the prior decision is the law as applied to the fact situation until changed by competent authority.

Such results have been reached and applied by arbitrators of the highest prestige in cases arising in the broad spectrum of American industrial society. The conclusions flow from the conviction of arbitrators and the courts that a collective labor agreement differs in important and material respects from a contract for the manufacture and delivery of nuts and bolts of given specification or any other conventional commercial agreement.[1]

The Company briefs cite and quote from court and arbitration cases in which the simple rule (that when the contract speaks clearly the parties are bound by its terms) is proclaimed, and in which there is no discussion of the

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[1] See, generally, Rights Under a Labor Agreement (1956) and The Legal Nature of Collective Bargaining Agreements (1958) by Professor Archibald Cox in 69 Harv. L. Rev. 601 and 57 Mich. L. Rev. 1, respectively. Also, see, in particular, the most recent and penetrating article on the subject: A General Theory of the Collective Bargaining Agreement by Professor David E. Feller in 61 Calif.L.Rev. No. 3, May, 1973 at pages 718 et seq.

role to be played by such circumstances as are mentioned above. The writer has no quarrel, whatsoever, with such citations and quotations. They express the rule normally applied in the interpretation and application of conventional contracts and of collective agreements as well. The absence of a discussion of the role of practice, or the effect of contradictory grievance settlements in those decisions, can be attributed, possibly, to the absence of facts which would justify it.

On the basis of what has been said, I feel it necessary to overrule the Company's objections to the documentary material (and supporting testimony) which is under discussion. The Company cannot be faulted for arguing that a contract requires or permits what its words mean, and nothing else; but this does not foreclose the Union, in a labor-management dispute, such as this, from presenting evidence that, in the light of past circumstances, shows that what has been written has a special meaning or that it is incomplete in expression. In my judgment the material offered for the record by the Union which was objected to by the Company, falls within this area and I would regard it to be a grievous error for the Arbitrator to refuse to accept it as part of the record of the case.

It is now appropriate to set forth and appraise the material presented by the Union in order to determine whether it bears sufficient weight to overbalance the clear and unambiguous provision appearing in Section 10.02 of the 1971 Plan that the Company has the sole right to terminate the Plan " at any time."

In 1950, three separate documents were negotiated and signed: a collective bargaining agreement, a pension agreement and a pension plan.[2]

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[2] The present signatories and parties are the successors of other companies and unions; but for the purposes of this discussion, this fact seems irrelevant and the history and chronology of successorship will not be referred to except when it appears important.

The 1950 Plan was an exhibit attached, not to the collective bargaining agreement of that year, but to a separate Pension Agreement. The Plan's Article V ("Employee Participation") Section 5.01 ("Eligibility") recognizes two distinct classes of hourly-rated employees who would be eligible to participate in the Plan: those in a bargaining unit represented by the Union (if the Union approves the Plan) and those not in a bargaining unit. These provisions were carried forward and contained in all later renegotiated or extended plans.

Accompanying the 1950 Plan, as stated above, was a Pension Agreement signed by the Company and the Union. Although the Plan applied to both classes of employees mentioned, the Pension Agreement was negotiated with the Union and only employees in the bargaining unit were beneficiaries of its provisions.

Separate Pension Agreements were negotiated and signed by the Company and the Union (on behalf of employees in the bargaining units) and on each of the years [3] when collective bargaining agreements were negotiated and signed by them, until 1968 and 1971 when the pension agreement and Plan were merged into a single document which was incorporated into the collective bargaining agreements.

In the 1950 Plan, in Article X ("Certain Rights of Company") Section 10.02 provided (as stated above) that the Company

> "shall have the sole right at any time to terminate the entire Plan."

This provision was carried forward in every renegotiated plan *including* the 1968 and 1971 plans.

Contained in the 1950 *Pension Agreement* (as distinguished from the Plan in which the Company's termination

[3] 1950, 1954, 1959, 1962, 1965.

rights as described in the previous paragraph were set forth), appeared the following:

> *"The Company waives its right to amend the Plan or terminate it as to employees represented by the Union while this Agreement [the Pension Agreement] is in full force and effect."* (Emphasis supplied.)

This express waiver of the Company's right to terminate the Plan as to union-represented employees (which right was reserved in Section 10.02 of the Plan) was not repeated expressly in Pension Agreements signed in 1954, 1959, 1962 and 1965. However, each of such subsequently executed Pension Agreements expressly referred to the 1950 Pension Agreement (after referring, also, to amendments thereof) and stated that in all other respects the 1950 Pension Agreement and the Pension Plan therein referred to "are hereby ratified and confirmed.[4] Accordingly, it is fair to say that by operation of the provision under discussion, *each of the Pension Agreements for the years 1950, 1954, 1959, 1962 and 1965 incorporated by reference the above quoted waiver by the Company, for the terms of such agreements, respectively, of its right to terminate the Plan as to union-represented employees.*

Thus, from 1950, until the 1968 documents were signed, although the Plan (as originated and subsequently amended) plainly gave the Company the right to terminate it at any time as to *both* union-represented employees and those not so represented, in the Pension Agreements negotiated with the *Union*, the Company waived that right as to Union-represented employees. Stated otherwise, the Company was legally bound *not* to terminate the Plan insofar as union-represented employees were concerned until the end of the term of Pension Agreement in which

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[4] There is some variation in language in the several Pension Agreements up to and including the 1965 Pension Agreement, but insofar as the provision under consideration is concerned, they were all to similar effect.

that waiver was set forth. The termination of the Plan as to non-bargaining unit employees was never limited or restricted or waived.

The first renewal of a collective bargaining agreement, a pension agreement and the Plan occurred in 1954. The parties provided in the 1954 Pension Agreement that

> "In all other respects, the Pension Agreement entered into between the parties hereto under date of September 7, 1950 and the Pension Plan therein referred to are hereby ratified and confirmed."

In the 1954 Pension Agreement the Company waiver of its right to terminate the Plan (as to union-represented employees), set forth in the 1950 Pension Agreement, was continued and extended—as it was for every year of contract renegotiation until 1968.

The 1954 Pension Agreement also set forth a number of "Whereas" clauses not contained in the 1950 Pension Agreement. Three of those clauses provided as follows:

> "WHEREAS, under the provisions of Sec. 10.01 of said Plan, *the Company has the right to amend the same as to employees not represented by unions* and intends to do so by amending Sec. 2.03 thereof and Article VI thereof to read as set forth in 'I' of this Agreement, and
>
> "WHEREAS, the Company also *intends to amend said Plan as to employees in some but not necessarily all of the bargaining units represented by unions provided the union representing the employees in each such bargaining unit consents thereto as required under the provisions of the aforesaid agreements with the Union* and similar agreements with other unions representing employees of the Company and the Company determines to so amend said Plan as to employees in each such bargaining unit, and
>
> "WHEREAS, the Company has determined to so amend said Plan as to employees represented by the Union *and the Union desires to have the benefits of said*

amendments extended to employees represented by it. * * * ." (Emphasis supplied.)

It is noted that these clauses do not refer to the right of the Company to *terminate* the Plan but recognize the legitimacy and authority of the Union's role in respect of the interest of union-represented employees, as a class, only in the Plan's *amendment*. However, although the right to amend and the right to terminate are set forth in separate sections of the Plan, both rights are set forth in its Article X of the Plan ("Certain Rights of Company") in contiguous sections with limitations appropriate to the exercise of each of these rights. Although the second "Whereas" clause recites, as a proviso, that "the unions representing the employees in each such bargaining unit consents thereto as required under the provisions of the aforesaid agreements with the Union," Section 10.01 of the Pension Plan will be read in vain for such a requirement. On the other hand, in the Pension Agreements, Paragraph 6 referred to the Company's waiver of *both* its rights to amend *and* to terminate the Plan. The waiver provision did not differentiate between amendment and termination. Inasmuch as the "Whereas" clause refers to "the provisions of the aforesaid agreements with the Union," the clause can be taken as evidence of the understanding of the parties at the time it was written that despite the provisions in Section 10.02 of the Plan itself, giving the Company the "sole right" to terminate it at will, the Company, in Paragraph 6 of the Pension Agreement, had waived that right both to amend and terminate the Plan for its term insofar as union-represented employees were concerned.

"Whereas" clauses, to similar effect, with changes not pertinent here were contained in the 1959, 1962 and 1965 Pension Agreements.

We now come to 1968 when the documentary pattern was altered. The practice of having a separate Pension Agreement document and a separate Pension Plan document was

abandoned. Exhibit C in the 1968 collective bargaining agreement states that

> "The parties thereto have agreed to a *Pension Agreement and Plan,* printed under separate cover, *which is made a part of this Agreement the same as if set forth at length herein*" (Emphasis supplied).

The change of format (having a single Pension Agreement and Plan instead of separate documents) was accompanied by other changes. The "Whereas" provisions did not appear in the 1968 Pension Agreement and Plan. More significantly, the provisions in Paragraph 6 of the previous pension agreements in which the Company waived its rights to amend or terminate the Plan as to union-represented employees was dropped.

The record made satisfies me that in the negotiations leading to the 1968 collective agreement and the 1968 Pension Agreement and Plan, neither side made a demand or proposal related to the abandonment of the waiver provisions; and, apparently, it had not been the subject of bargaining or even discussion. The Union brief argues that the absence of the waiver provisions was not even noticed.

Before 1968 the collective bargaining agreements and the pension Agreements expired on different dates. In 1968, however, the Pension Agreement and Plan, having been incorporated into the collective bargaining agreement by Exhibit C in the latter instrument, the Pension Agreement and Plan expired at the end of the term of the basic Agreement.

For all purposes pertinent here, the parties did in 1971 what they did in 1968. The "Whereas" clauses were abandoned; the Company's waiver of its right to amend or terminate was not mentioned; and the 1971 Pension Agreement and Plan was merged and incorporated into the collective bargaining agreement as a single integrated instrument.

The Company, as stated above, insists that the 1971 Pension Agreement and Plan should be read as it is written—a document clearly and expressly retaining the Company's sole right to terminate the Plan unrestricted, unlimited and unencumbered by any previous waiver of that right such as was contained in five pension agreements signed before 1968.

The Union, however, argues that the right of the Company to terminate the Plan with respect to union-represented participants has been waived until May 1, 1974, the termination date of the 1971 collective bargaining agreement which incorporates the Pension Agreement and Plan as though set forth therein at length.

The record establishes to my satisfaction that in 1950 and in each renegotiation of the basic Agreement up to 1968 there was a carrying forward and an extension, not only of the right of the Company to terminate the Plan (stated in the Plan) but its waiver of that right in respect of union-represented employees for the term of the Pension Agreements. The understanding of the parties during those years was never in doubt, and they expressed that understanding with clarity in their written agreements.

The Arbitrator is now asked to close his eyes to this long established practice in view of the unexplained and mysterious absence of the waiver provisions in the 1971 (and 1968) Pension Agreement and Plan and the retention, in the Plan, as amended, of the provision giving the Company the sole right to terminate the Plan, at will.

Had the 1968 and 1971 documents, in terms, expressly negated the continued existence of the waiver provisions, there could be no doubt, whatsoever, that the Company should prevail in this dispute. Similarly, had the Company in the 1968 and/or 1971 negotiations proposed or demanded the elimination of the waiver provisions in the

documents signed for those years; had the Union resisted such a proposal; and had the resulting signed documents, in fact, no longer contained them, the parties would be arbitrating a different case.

Here, however, a long-standing and repeatedly expressed waiver of a right to terminate a Pension Plan as to union-represented employees disappeared from the 1968 and 1971 Pension Agreements under circumstances that nobody can account for or explain. The absence of the provision affects very substantial rights under the Plan.

Granting, *arguendo,* that competent parties should be held to the terms (or the absence of terms) of the documents they negotiated, examined and then signed, the question is whether, under the facts of this case, the important rights in the Pension Plan can be destroyed or substantially reduced by the mysterious and unexplained absence of the waiver provisions in the 1968 and 1971 documents.

The law of contracts is grounded firmly on fulfillment of the reasonable expectations of the parties. This standard has special pertinency in management-labor agreements which as have been observed, have extraordinary characteristics not found in conventional commercial contract relationships. The Company argues with force that a union such as the UAW with a skilled staff and consultants conversant with the provisions of pension plans, had a duty, before signatures were placed on the documents, to have reviewed and studied them with such care as would have disclosed the absence of the waiver provisions in the 1968 and 1971 pension agreements—and it should be bound by the fact that a provision in predecessor agreements was not carried forward. That such a duty devolved on the Union may be conceded. However, this is not the end of matter. The 1968 and 1971 Pension Agreement and Plan were prepared by the Company and presented to the Union for review and signatures. Those documents represented a radical departure, in format and in specific respect with

substantive importance, from predecessor pension agreements. It was the duty of those who drafted the documents to bring to the attention of those to whom they were presented for signature any and all significant respects in which the proffered documents differed from their predecessors in material matters. The duty of the Company, in this case, to disclose the respects in which the 1968 and 1971 Pension Agreement and Plan differed from the provisions of prior pension agreements (by dropping the waiver provisions) is not to be equated with the duty, for example, which a property owner owes to a trespasser. The Union's clear duty to review the changed document with care is more than balanced by the duty of the Company to inform the Union what has been changed, in what respects, and what has been eliminated. In the instant situation, the record does not indicate or suggest that, in not having made such disclosure, the Company was guilty of some species of misrepresentation, fraud, or deceit. Indeed, it might well be the fact that the Company was as innocent of knowledge of the elimination of the waiver provision as the Union. Nevertheless, if the Company can be charged with *knowledge* of dropping of the waiver provisions in the 1968 and 1971 documents, its failure to inform the Union of the absence of the waiver provision is an important neglect of duty in their relationship. If the Company were unaware, itself, that the provision had been dropped, it is in no position to argue that the Union should have had a greater awareness of the fact than the drafting party; or to claim that the Union had failed in its own duty to conduct an appropriate review of the new document. A failure to notify the Union of the absence of a provision, on the continued presence of which the Union had a right to rely (based upon its inclusion in a series of documents going back to 1950) in my judgment, constitutes a serious failure of duty.

As the recipient of the redrafted document, the Union had a right to expect that the waiver repeatedly included in

previous pension agreements continued in effect to protect the employees it represented from unilateral termination of the Agreement by the Company. The absence of the waiver provision is inconsistent with a long existing state of facts on the continuance of which the Union had a right to rely. To be sure, during the years prior to 1968 there were changes in the pension agreements and pension plans; but these changes were always the subject of discussion and negotiation and were the subject of *explicit amendments* in writing. Each Pension Agreement can be said to be an extension, over time, excepting for those well understood amendments, *expressed in writing.* The change which resulted from the unheralded and unexpected elimination of the waiver provision is in a different category. The established structure and organization of the relationship was radically changed and its fundamental character altered by the disappearance of a vital provision.

When, in 1968 and 1971, the Pension Agreement and Plan were signed, excepting for the amendments negotiated and specifically expressed in terms, the documents projected forward *all* of the important characteristics of the reciprocal rights and duties that had previously been a part of that relationship. If "major conditions of employment are to be regarded as included within a collective bargaining contract, negotiated after the practice has become established and not repudiated by it"[5] *a fortiori* a waiver provision consistently expressed over time in a series of documents continues viable unless knowingly repudiated or withdrawn. The principle involved is well expressed by Cox and Dunlap in the following terms:

> "A collective bargaining agreement should be deemed, unless a contrary intention is manifest, to carry forward for its term the major terms and conditions of employment, not covered by the agree-

[5] Phillips Petroleum Co., 24 LA 191, 194, 195 (cited in the Union brief).

ment which prevailed when the agreement was executed."[6]

Indeed, the writer's experience informs him that it is most difficult to conceive that a Union would knowingly, lightly, or casually acquiesce in the elimination of a Company waiver of a right to terminate a pension plan in which the employees it represents participate without a vigorous struggle or, at least, the attempt to obtain some satisfactory quid pro quo. To accept the Company's thesis would mean that one week after the signing of the 1971 (or 1968) pension agreement and plan, the Company, at will, could have terminated the Plan, despite the fact that it had agreed in writing to waive the exercise of that right for eighteen years in a series of five documents. The Company's thesis is incompatible with the institutional behavior of labor organizations in our society and does not take into account of the reasonable expectations that the usages of the past have engendered.

These conclusions are also supported by the Hansen letter (so-called). In November, 1971 after the extension of the Plan had been negotiated the Company transmitted to the Union a draft document of a pension agreement and plan, as amended, which it prepared. The omissions, changes and departures in format, from the pension agreements and plans of the past were described as "intended only to simplify and clarify the language of the 1968 Plan and are not intended to make any change of substance in that Plan"; also, "it shall be understood that such omission and changes are not intended to effect any change in substance from the 1968 Plan but are intended only to simplify and clarify the provisions of the 1968 Plan that have been carried over into the 1971 Plan."

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[6] "The Duty to Bargain Collectively During the Term of Agreement," 63 Harv. L. Rev. 1097, 1116, 1117 (1950).

Section 8 of the draft acompanying the Hansen letter provided that it "shall continue in effect through April 30, 1974 * * *."

In January, 1972, since the Company had reached a decision to close down the two plants, it informed the Union that it was no longer interested in pursuing the matter referred to in the Hansen letter. On January 26, 1972 the Plan was signed, but not in the form contemplated by the draft.

The point of the Hansen letter, as argued by the Union, is that in late 1971 and early 1972 the Company, by providing in the proffered draft of a proposed rewritten plan that "it shall continue into effect through April 30, 1974," evidenced an intention and understanding that the 1971 Plan should have the same life as the 1971 collective bargaining agreement.[7] In sending the letter the Company demonstrated that it had in mind the same term for the 1971 Plan and Pension Agreement and Plan as that presently contended for here by the Union; namely, April 30, 1974, the date on which the 1971 collective agreement and the 1971 Pension Agreement and Plan were to come to an end of their effectiveness, by their terms.

The considerations set forth above, in the writer's judgment, strongly conduce to the conclusion that although the Plan could be terminated at will by the Company as to employees not represented by a union, those represented by a Union, since 1950, were the beneficiaries of a continuing waiver, by the Company, of the right to terminate; and the unexplained circumstances under which that provision was dropped from the 1958 and 1971 Agreement did not affect the viability or effect of that waiver.

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[7] Although the draft accompanying the Hansen letter was never signed, it is a fact that the 1971 collective agreement, which incorporates fully the 1971 Pension Agreement and Plan, does terminate on May 1, 1974.

In addition, it should be emphasized (although reference to the matter has been made above) that Exhibit C of the extant collective bargaining agreement which terminates on May 1, 1974 contains an understanding that the Pension Agreement and Plan

"is made a part of this agreement the same as if set forth at length herein." (Emphasis supplied.)

Thus, the 1971 Pension Agreement and Plan which was merged into and absorbed by and is a component of the collective bargaining agreement lives to the end of the term of the collective bargaining agreement. The Plan has no independent termination date nor is there a Pension Agreement with a different termination date. The Pension Agreement and Plan of 1971 draw their termination date from the collective bargaining agreement of which they are parts.

These circumstances leave the Company free to invoke Section 10.02 of the Plan to terminate the Plan at will insofar as members of nonbargaining unions [sic] are concerned. The fact that the Plan has been absorbed into the collective bargaining agreement, however, reinforces the point that, insofar as union-represented employees are concerned, the Company's right to terminate, expressed in Section 10.02 of the Plan, is affected by and is subordinated to the provisions of the collective agreement.

Accordingly, on this question, I conclude that the Company had no power or right unilaterally to terminate the Plan as to union-represented employees on June 30, 1972.[8]

If a negative answer is given to the question whether the Company had a right to terminate the Plan in June, 1972, one is given to wonder whether there is any present

[8] In order to avoid prolixity, I have not attempted to discuss every point presented by counsel for the parties in their very able and comprehensive briefs. I shall only say that those briefs have been carefully read, in full, and given due consideration.

occasion or need to adjudicate the claim of the Union that benefits have been wrongfully reduced to a level below that provided for in the Plan. As the Company's argument is understood, once the Plan was terminated by invoking Section 10.02 of the Plan the reduction in benefit level properly followed, as a matter of course. If this be correct, then a holding that the Company could not terminate the Plan before May 1, 1974 would require an award reinstating the benefit levels which were in existence before the attempted termination date and making whole retirees who were disadvantaged by the Company's action.

Both parties, however, in their "Statement of the Issues to be Arbitrated" and in their briefs have argued the effects of the guarantee letter and the status of Supplemental Allowances. Even if the decision on the right to terminate the Plan on June 30, 1972 should dispense with an urgent present need to choose between the positions advanced by the parties with respect to the guarantee and supplemental allowances, it is recognized that the time is not far distant when administrative decisions will have to be made on such matters. Accordingly, I am taking the presentations made to me to be in the nature of a request for a declaration of rights. Any failure to discuss such matters at this time might properly be regarded as an abdication of a duty and burden placed on the Arbitrator which would subject the parties to additional costs and delays when the Company may properly exercise its rights to terminate the Plan.

B. The Level of Benefits

1. The Guarantee

In the course of the 1967 negotiations, the Union sought a national pension plan from the White Company. This demand was successfully rejected by the Company; and, after discussions of alternative proposals under which White would be obligated "to at least assume the same

kind of liabilities that would come forth if there had been a central agreement," the parties agreed upon a guarantee plan which was expressed in a letter which was sent to the Union following the close of negotiations. A similar letter was sent in 1972 following the close of the negotiations for the 1971 agreement.

The March 3, 1972 letter recites that the Union had proposed and the Company had agreed to guarantee retirement benefits under the Pension Plan in the event the two plants should close and there should be "a resulting termination of the Plan." It then states a number of conditions among which is the following:

> "1. The guarantee shall apply to the deficiency, if any, *after the disposition of Trust Fund assets* in accordance with the termination provisions of the Plan.
>
> "2. The guarantee shall apply only to the level of benefits set forth in the Plan as amended by the Company-Union Agreement of May 10, 1968, for all credited service as an employee of White Motor Corporation, plus $2.00 per month for all prior credited service with Minneapolis-Moline, Inc., prior to acquisition by White Motor Corporation. * * *." (Emphasis supplied.)

When the Company terminated the Pension Plan on June 30, 1972 the level of benefits payable out of the Trust Fund to retirees was reduced from that to which they were entitled under the terms of the Plan to the lower level of benefits contemplated and provided for by the guarantee. The Union objects to this procedure claming that it is the Company's obligation and duty (from June 30, 1972 forward) to continue to pay benefits on the level required by the Plan to retirees so long as there are assets in the Trust Fund available for that purpose. It has been computed, and it is asserted, that such assets would be available for about twenty months beyond May 1, 1974, the date of the expiration, by its terms, of the extant collective bargaining

relationship. When those assets, the Union argues, are insufficient for that purpose and the Fund is depleted, the guarantee then requires benefit payments to eligible participants at the lower level of benefits of the guarantee for the remainder of their lives.

The Union objects to the procedure followed by the Company on the ground that, starting on June 30, 1972, the benefits to retirees were reduced drastically and that the Company is using Trust Fund assets to discharge its duty under the guarantee—and that its duty, properly considered, was to pay the guaranteed amounts when, as and if the Trust Fund will have been depleted: an eventuality that has not occurred.

The Company's position is that on June 30, 1972 the assets of the Fund patently were insufficient to continue the full level of benefits to retirees for their lifetimes and, accordingly, it was appropriate, actuarially, to reduce payments as of that date in order to ensure that benefits will be payable to retirees for their lifetimes. It presented the testimony of experts in pension agreement drafting and administration to demonstrate that "it is universal practice to prorate benefits upon the termination of funds in order that the benefits may continue to be paid to members of a priority class." It refers to Section 10.02 of the Plan which provides that

> "In the event of such termination, the funds of the Plan shall be used to the extent adequate for the purposes as follows:
>
> "(a) To provide for the continuation of pension payments to all pensioners who shall have retired prior to the date of such termination without reference to the order of retirement * * *"

and to provide for benefits to subordinate classes of retirees. It argues that language of Section 10.02 of the Plan "implies a reduction in benefits if the Fund is not

adequate to continue full benefits for the expected lifetime of the retirees."

I do not find the implication in Section 10.02 contended for by the Company. Section 10.02 of the Plan addresses itself, in terms, only to the order of priorities of three classes of participants in the event of termination of the Plan and the inadequacy of funds to fulfill its "purposes." It identifies the three classes. It does not address itself to the question of the *level of benefits* to be paid in the eventuality that the funds are inadequate for the purposes. When the preamble provision states that "the funds shall be used to the extent adequate for the purposes as follows" it is referring to the dedication and application of assets in sequential order of priorties to the three classes and not to a system of proration. "To the extent adequate" means to the writer that, to the extent that moneys are available in the Fund, the *priorities* described shall be recognized; to the extent that there are insufficient moneys, retirees in the lowest priority classes may not receive pensions. The creators of the Plan were highly sophisticated and skilled draftsmen. Had they desired to freight Section 10.02 with directions as to the proration of the moneys in the Fund and the reduction of benefits in order to achieve a payment of pensions over a longer period of time than would be the case if the full benefit scale were continued, it must be assumed that they would have said so.

Subsection (a), stating it to be one of the purposes of the Fund "to provide for the continuation of pension payments to all pensioners who shall have retired" before the Fund's termination also gives no comfort to the Company or support to the implication it claims to draw from Section 10.02 of the Plan. To say that continuation of pensions shall be provided is not to say, also, that they shall be continued at one level or another. The section only informs us that, in the event of termination, to the extent funds are adequate, those funds should be used or continued to be paid for pensions.

These conclusions are fortified by the fact that the "guarantee" given to the union states that it shall apply

> "to the deficiency, if any, after the disposition of Trust Fund assets in accordance with the termination provisions of the Plan."

The Company has undertaken to ensure, warrant and to guarantee the fulfillment of a particular pension program in the event that the Fund is insufficient to meet all of its obligations in full—but the guarantee is only that payments of pensions will be made on the reduced level described. Furthermore, it applies only to a "deficiency." Perhaps the draftsman's skills might have made intention and meaning clearer than it is; but I read this to mean that, at the point in the history of the Fund when it is no longer possible to pay retirees the pensions provided under the Plan at the level provided for in the Plan, the guarantee obligation which was to be triggered by the closing of the plants, upon the event of a "deficiency", springs into life to require payments at the level stated in the guarantee letter. A guarantee is only a guarantee; it is not a primary obligation. A Guarantor does not normally discharge his obligations before the time when he is called upon to make good the delinquency of the principal debtor. The Guarantor is called to account, one would think, when the principal debtor defaults and is unwilling or unable to pay. Similarly, the Company as Guarantor would be required to discharge its duties when the plants are closed, the Plan duly terminated and the Fund is in such a state of depletion that the Plan's level of benefits cannot be continued. Here, however, by switching to the lower level of benefits on June 30, 1972, the Company has placed the Guarantee program in action prematurely and deprived retirees of the substantial rights they possessed —to receive current benefits from the Plan at the levels it provides so long as the moneys in the Fund are sufficient for that purpose.

The Company states that since the actuarial computation made in June, 1972 showed that the assets in the Fund, if prorated, were insufficient to pay lifetime pensions to retirees at the level guaranteed by the guarantee letter, the Company has properly commenced the payment of benefits at the guaranteed level on that date. The gurantee, however, is stated to apply, to the "deficiency, if any." I read these provisions to mean, very simply, that if the Plan should be terminated (as stated in the preamble paragraph, "after the disposition of Trust Fund assets in accordance with the termination provisions of the Plan") following the closing of the plants the Company guarantees the payment of pensions at the level provided in the latter. It is argued that the phrase "deficiency, if any" must mean the actuarially determined extent, on termination of the Plan, to which the assets of the Fund are insufficient to meet the Plan's obligations; and that this justified the application of the guarantee level in June, 1972. However, this ignores the fact that the guarantee letter very plainly says that the guarantee shall apply *"after the disposition of the Trust Fund assets."* (Emphasis supplied.) This means that the guarantee does not apply until the moneys in the Fund have been disposed of by pension payments under the Plan.

When the Company instructs the Trustee to pay pension benefits to retirees out of the Fund at the lower level referred to in the Guarantee letter, rather than the full benefits under the Plan, it extends the period of the Fund's solvency and puts off the day when its guarantee becomes effective. It shortens the period during which it must make payments under its guarantee to the substantial detriment of retirees who until the disposition of the Fund's assets are being paid at the lower guarantee levels. During that period, moreover, as the Union brief points out, the mortality of some of its employees will reduce the Company's obligations under the guarantee.

In summary, on this point, I find that, as this Fund is constituted, in relation to the 1971 collective labor agreement, the 1971 Pension Agreement and Plan, the Guarantee letter and the history of the relationship of these parties as reflected in the documents that have been signed since 1950:

1) The Plan could not have been terminated, as to union-represented employees, in any event, without Union assent, before the expiration of the extant collective bargaining agreement on May 1, 1974.

2) The termination of the Plan as announced as of June 30, 1972 was premature and a violation of rights.

3) The reduction of benefits under the Plan to the benefit level provided in the Guarantee letter is premature, unauthorized and improper. Retirees under the Plan are entitled to the level and scale of benefits provided therein so long as there are assets in the Fund sufficient therefor. The Guarantee letter and its contents have no relevance to or impact upon the rights and duties of the Company, the Union and empolyees (retirees) unless and until the plants had been closed, the Plan terminated and the Trust Fund assets had been disposed of to the point that they are inadequate to pay benefits at the scale required by the Plan. A reduction of benefits to the guarantee level is unjustified and improper if based only on the actuarial computation that on June 30, 1973, the Fund's moneys will be insufficient to meet the Plan's obligations to pay lifetime benefits to eligible retirees. [9]

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[9] The Minneapolis plant is closed; the Hopkins plant was still operating at the time of the hearing but it was represented that it will probably close. The Arbitrator finds it impossible, in this lengthy decision on a difficult and complicated matter, to address himself to all of the eventualities that might occur on May 1, 1974 and does not undertake in this opinion to state what the rights and duties of the parties might be on a series of factual speculations.

2. *Supplemental Benefits*

When, in mid-1972 the Company, on its theory of its rights, terminated the Plan and reduced retirees thereunder to the level of benefits contemplated by the Guarantee letter, it also terminated Supplemental Allowances. The Union grieves this action and asks that an award issue for Supplemental Allowances not paid as required.

Supplemental Allowances are provided for by Section 6.15 of the Plan for retirees who opt for early retirement thereunder as provided for by Section 6.02(b). At the age of 55 (or earlier if disabled) a participant retiring may apply for early retirement pensions which, in amount, would be a stated percentage of his normal pension payment had he retired at the age of 65. Section 6.15(a) (iii) of the 1971 Plan provides for a "monthly supplemental allowance in addition to his pension." Section 6.15 (c) provides that the supplemental allowance "shall cease on the earlier of age 65, death, reemployment by the Company, or cessation of pension for any other reason."

The Company points out that Section 10.02 of the Plan provides that upon termination, the funds shall be used to provide for the continuation of *pension* payments and that Supplemental Allowances are not "pension" payments within the meaning of that section; also, that "when the Plan is terminated, the obligation to pay allowances is also terminated."

For present purposes, it can be said that inasmuch as it is being held that the Company had no right to terminate the Plan (which provides for various kinds of benefits including Supplemental Allowances) on June 30, 1972, it follows that it had no right to terminate Supplemental Allowances provided for in the Plan.

One of the issues presented to the Arbitrator, however, is

> "3. Regardless of when the Plan is validly terminated (June 30, 1972 or May 1, 1974) should the pay-

ment of Supplemental Allowances end with the termination of the Plan or is the continuation of the Supplemental Allowances beyond the termination of the Plan contemplated by the termination provision of the Plan (Section 10.02) and the Pension Guarantee (1971)?"

An employee who retires before the normal age of 65 recoups, in Supplemental Allowances, to the limited extent provided, what he loses by an early retirement pension. An early retiree would experience some difficulty in perceiving a legal difference between the early retirement pension he receives and the Supplemental Allowance which is added to it. To the retiree, a Supplemental Allowance is simply an additional pension-benefit payment. It seems clear that those who retired since 1968 when Supplemental Allowances were provided for in the Plan were induced to do so, to a considerable degree by the realization that early retirement (until the age of 65) would assure them of larger monthly benefit payments from the Fund than they would have received had they opted for early retirement at an earlier date.

However, apart from the way a pensioner is likely to view Supplemental Allowances, it does appear to the writer that they are "pensions" within the meaning of Section 10.02 of the Plan. The fact that the Plan uses the two terms in various of its provisions ("pensions"; "supplemental allowances") proves nothing in view of the fact that the provision for supplemental allowances for the first time in 1968 necessitated some verbal way of distinguishing the pension payments previously provided for from those provided for thereafter to supplement the early retirement payments. The legal nature of a payment is not changed by the label placed on it for administrative or drafting purposes.

In practice, the Supplemental Allowances were paid out of the Pension Fund itself (as was appropriate) and the

Fund was reimbursed at stated intervals therefor by the Company. The fact that the *Fund* paid the Supplemental Allowance to retirees goes far to demonstrate that they were not something other than pensions. It is not to be assumed that fiduciaries administering a trust will make payments out of the trust funds for any purpose other than the core purpose of the trust: the payment of "pensions." On the other hand, the fact that the Company reimbursed the Fund does not mean the payment was not a "pension." This was merely the mechanism used for financing the Supplemental Allowance system.

The Company argues that the Guarantee letter does not refer to or cover Supplemental Allowances. Neither does it refer, specifically, to an early retirement pension. The guarantee (paragraph 2) applies to the "level of benefits" set forth in the Plan; for all credited service as an employee of White Motor Company. The Company asserts that as Supplemental Allowances are not directly related to credited service, the guarantee does not extend to this type of benefit. But it seems clear that the computation of a Supplemental Allowance requires a determination of an early retiree's "total monthly pension" which, in turn, is necessarily related to his years of credited service. Under Section 6.15(b)(A)(i) his allowance will be "reduced by 1/360th for each month that his *credited service* is less than 30 years." (Emphasis supplied.)

There may well be difficulties, as the Company argues, in computing the guarantee obligation in respect of Supplemental Allowances and it may be "extremely difficult, if not impossible to purchase an annuity for supplemental allowances." (Company Brief p. 43.) The Union denies that these difficulties exist. The arbitrator has no basis in the record to make findings of fact in respect to their differences. But the existence of practical or administrative difficulties by themselves does not determine the nature or quality of the basic obligation. That is to be determined

by answering the question whether Supplemental Allowances under the pension system represented by the documents in the record are "pensions" for the purpose of the "Continuation of pension payments" following termination of the Plan. The Arbitrator finds that they are "pensions."

Awards, as follows *

1. The Company violated existing collective bargaining agreements with the Union by unilaterally terminating the Pension Plan prior to May 1, 1974.

2. Regardless of when the Plan may be terminated and assuming the assets of the Pension Fund at that time are insufficient to make pension payments at current levels to all retirees (and/or beneficiaries and contingent annuitants) for their remaining lifetimes, the 1971 Collective Bargaining Agreement and the 1971 Pension Agreement and Plan (Section 10.02) it incorporates and the Guarantee letter of March 3, 1972 are interpreted to require that pension payments will be paid at full Plan levels, in accordance with the priorities established in the Plan's termination provision (Section 10.02) for as long a period as such levels can be financed by money in the Fund. Thereafter, and for the remainder of the retirees' lives, pension payments will be provided by the Company under the Pension Guarantee [1972] at the levels provided therein.

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* In drafting the Award, the Arbitrator has followed the language employed in "Statement of Issues to be Arbitrated" set forth on pages 30 and 31 of the "Conditions of Stipulation."